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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Federal Communications Commission
Office of Secretary

In the Matter of)

Amendment of Part 1 of the)
Commission's Rules --)
Competitive Bidding Proceeding)

) WT Docket 97-82

DOCKETED FOR MARCH 27, 1997

COMMENTS OF AIRTOUCH PAGING AND POWERPAGE, INC.

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SUMMARY

AirTouch Paging and PowerPage, Inc. (the "Companies") hereby submit their comments to the *Notice of Proposed Rulemaking* adopted in this proceeding. The Companies provide wireless messaging services throughout the United States. Future messaging spectrum will be licensed by competitive bidding. Consequently, the Companies have a direct interest in the outcome of this proceeding. The Companies respectfully submit that the general auction rules adopted in the instant proceeding should not supersede service-specific auction rules adopted in prior proceedings pursuant to substantial record evidence and industry participation. Where service-specific rules and general auction rules diverge, service-specific rules should govern. By way of example, the Companies strongly urge the Commission to leave in place the compromise reached on stopping rules in the paging auction context.

The Companies support several of the Commission's proposals for generic auction rules. These proposals will discourage insincere auction participation and bidding, and will reduce the risk of default. The Companies agree that Applicants seeking to take advantage of installment payments should be screened prior to the auction to determine their credit-worthiness. Further, auction participants should be required to maintain upfront payments equal to at least five percent of their total bids for the most recent round. Participants whose upfront payments fall to four percent should be required to bring their upfront payment to six percent of their total bids within five business days. Upfront payments of auction participants who withdraw fully from the auction should be refunded, less a fee assessed to recover the administrative costs of that party's participation in the auction. Applicants should be permitted to amend their Form 175 applications to specify additional markets until upfront payments are submitted. This will permit applicants to correct omissions and to solidify back-up strategies.

The Commission should provide limited relief, in the form of grace periods and associated late penalties, to auction winners submitting second down payments, final payments or installment payments. Certain conditions should apply to this relief to avoid abuse. The Companies also agree that auction winners whose long-form applications are the subject of petitions to deny should be required to submit their second down payment at the same time as other winners -- they should not be granted additional time in which to secure capital to meet their obligations while their competitors are required to submit payments to the Commission. Finally, the Companies agree that cross-defaults will deter defaults on licenses.

With respect to the bidding process itself, the Companies oppose the Commission's proposal to establish minimum opening bids and maximum bid increments. Both of these proposals are contrary to the principle that market forces should govern the value associated with the licenses to be auctioned. While the Commission may supervise the pace of the auction, it should not assume the role of market participant. Bid withdrawals should be permitted at any time during the auction, subject to applicable withdrawal penalties. The winner in the round preceding the withdrawing participant's bid should be permitted to re-bid for the license, and re-gain any necessary eligibility to submit such bid.

The Companies support the adoption of a safe-harbor to the anti-collusion rules to encompass discussions relating to acquisitions/mergers and inter-carrier agreements. This safe-harbor provides auction participants with the flexibility they need in order to pursue business opportunities that permit them to remain competitively viable. Finally, the Companies agree that the pre-grant construction rule should be extended to all auctions. This rule advances the goal of prompt introduction of service to the public, and will permit incumbent auction winners to make much-needed system modifications.

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COMMENTS

AirTouch Paging ("AirTouch") and PowerPage, Inc. ("PowerPage") (collectively referred to as the "Companies"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules,^{1/} hereby submit their comments on the *Notice of Proposed Rulemaking* (the "*Notice*")^{2/} adopted in the captioned proceeding. The following is respectfully shown:

I. INTRODUCTION

1. The Companies each have an interest in the generic auction rules adopted by the Commission. The Companies provide wireless messaging services throughout the United States. Pursuant to rules recently adopted by the Commission,^{3/} future applications for messaging spectrum will be subject to competitive bidding procedures. AirTouch participated in the proceeding initiated to

^{1/} 47 C.F.R. §§ 1.415, 1.419.

^{2/} FCC 97-60, released February 28, 1997.

^{3/} *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rulemaking*, (the "*Paging Market Area Licensing Order*"), FCC 97-59, released February 24, 1997.

establish rules governing the messaging service auctions,^{4/} and intends to remain involved in that proceeding until final rules are established.

2. The *Notice* indicates that the general competitive bidding rules adopted in this proceeding should, to the extent possible, govern all future auctions, including auctions for all services that are subject to pending proceedings (e.g., messaging), and auctions for future licenses in services which already have competitive bidding rules.^{5/} The Companies oppose this proposal. Service-specific auction rules already established pursuant to separate proceedings and based upon substantial record evidence should not be superseded by generic auction rules. Where service-specific and generic auction rules diverge, the service-specific rules should govern.

II. DISCUSSION

A. The General Auction Rules Adopted in This Proceeding Should Not Supersede Service-Specific Rules Adopted After Significant Deliberation and Industry Participation

3. The general auction rules adopted in the proceeding should not supersede service-specific auction rules adopted in other proceedings based upon record evidence, industry participation and reasoned deliberation. The Commission must not depart from past policy without providing a reasoned explanation for such departure. The Commission's single statement in the *Notice*, that it proposes to apply the generic rules adopted here to all future auctions, regardless of whether service-specific rules have been adopted, fails to provide adequate explanation for its proposed rejection of those rules. Thus, where the general auction rules adopted here

^{4/} Comments of AirTouch Paging filed March 18, 1996.

^{5/} *Notice*, para. 18.

diverge from previously-adopted service-specific rules, the service-specific rules should govern in future auctions.

4. One example of such a rule is the compromise reached with respect to auction stopping rules in the *Paging Market Area Licensing Order*. The compromise was reached by the Commission based upon information in the record of that proceeding and after significant deliberations with interested parties. To the extent that the Commission undertakes further review of the compromise, such review should be conducted in the context of reconsideration or review of the *Paging Market Area Licensing Order*.^{6/}

5. AirTouch was one of several commenters supporting a frequency-by-frequency, market-by-market stopping rule for messaging service auctions.^{7/} Although the Commission declined to adopt the stopping rule as proposed, it recognized that the auctions could continue for an unpredictable and extraordinary length of time absent the implementation of a non-simultaneous stopping rule. Consequently, the Commission adopted a complex stopping rule which is a hybrid of the simultaneous stopping rule used in other auctions with the frequency-by-frequency, market-by-market stopping rule supported by the commenters.^{8/} Pursuant to the compromise, the auction is divided into three stages. During the first stage, a simultaneous stopping rule will be applied. By the third stage, a frequency-by-

^{6/} Petitions for reconsideration and/or review are due to be filed within the next several weeks. The Companies understand that one party already has appealed the order to the United States Court of Appeals for the District of Columbia Circuit.

^{7/} Comments of AirTouch Paging, Arch Communications Group, Inc. and Westlink Licensee Corporation, MobileMedia, American Paging, Paging Network, Inc., A + Networks, and the Personal Communications Industry Association, filed March 18, 1996,

^{8/} *Paging Market Area Licensing Order*, para. 103.

frequency, market-by-market stopping rule will be automatically implemented.^{9/}

This compromise is an exception to the general simultaneous stopping rule.

6. Based upon the number of licenses that will be available in the messaging auctions (over 15,000), it is critical that this compromise not be rendered moot as a result of the adoption of general rules governing all future auctions. As AirTouch pointed out in its comments filed in the messaging auction proceeding, interminable or lengthy auctions would delay critical system expansions which are essential to existing carriers' ability to serve customers. Such delay is inconsistent with the public interest. In addition, a decision by the Commission to apply the general simultaneous stopping rule to the messaging auction would only exacerbate the risk to *bona fide* licensees interested in a specific license of being held hostage by speculators in the auctions. A simultaneous stopping rule, combined with the phantom mutual exclusivities which will be created by the ability of auction participants to check an "all" box with respect to licenses of interest and the absence of license-specific upfront payments, would prevent auction participants who are genuinely interested in promptly introducing service to the marketplace from achieving that goal.

7. The *Notice* does not propose a general stopping rule or to replace or modify the stopping rule compromise reached in the *Paging Market Area Licensing Order*.^{10/} However, the Companies believe that the Commission's statement in paragraph 18 of the *Notice*, regarding the intended general applicability of these rules, warranted the filing of comments on this issue. To the extent that the Commission

^{9/} *Id.*

^{10/} Instead, the *Notice* indicates that the Wireless Telecommunications Bureau may address this issue. To the extent that the Bureau intends to address this issue, the Companies respectfully submit that the Bureau's decision must be consistent with that reached by the full Commission in the *Paging Market Area Licensing Order*.

intends to address this issue in this proceeding, the Companies respectfully request that the Commission render a decision consistent with these comments.

B. Participants Eligible for Installment Payments Should be Screened Prior to the Auction

8. The Companies support the Commission's proposal to screen applicants eligible for installment payment plans for credit-worthiness.^{11/} A stringent, commercially reasonable screening process should help to avoid defaults on licenses, and resultant re-auctions. And it will provide certainty to the auctions. Parties to auctions should be able to proceed with the knowledge that other auction participants are able to satisfy obligations incurred during the auction. The criterion the Commission should utilize to determine credit-worthiness should be identical to those used by commercial financial institutions to evaluate potential borrowers' credit-worthiness, e.g., review of business plans, proposed use of proceeds, debt levels, financial information, etc. The costs associated with conducting reviews of applicants' credit-worthiness should be recovered from the assessment of commitment fees to the applicants seeking to use installment payments. These fees should be assessed at rates comparable to those charged by commercial financial institutions.

C. Applicants Should be Permitted to Amend Form 175 Applications to Add Licenses

9. The Companies support a rule which would permit potential auction participants to add licenses to previously-filed Form 175 applications. This rule would enable participants to correct mistakes present in their originally filed applications and maintain a window in which to solidify back-up business plans prior to the auction event. The Companies agree that certain safeguards should be implemented in order to prevent gamesmanship during the auctions. First, the

^{11/} Notice, para. 34.

addition of licenses to the Form 175 application should be permitted only until the date upon which upfront payments are required to be filed, so that participants are not able to use upfront payment/eligibility information to game the auction. Also, the Commission should impose a cap on the number of licenses a participant can add to its Form 175 (e.g., 10 percent of the number of licenses applied for on the originally filed Form 175). This cap will prevent parties from using the amendment phase to game the auction, and still permits participants to pursue back-up strategies and rectify unintended omissions. The Companies do not support limiting the ability to add licenses to only those licenses for which two or more participants have filed. This limitation bears no relation to the purpose the Commission seeks to further with this rule -- to permit corrections to applications and promote flexibility. Moreover, the other limitations proposed by the Companies should serve to discourage gamesmanship.

D. Auction Participants Should be Required to Maintain Upfront Payments Equal to a Percentage of Total Bids

10. The Companies respectfully submit that auction participants should be required to maintain upfront payments with the Commission equal to a percentage of their total bids. This requirement would reduce the risk of default, and would discourage parties from submitting "jump bids" if they have no intent of remitting those funds to the Commission if their jump bid is successful. The Companies suggest that each auction participant be required to maintain an upfront payment equal to five percent of its total bids for the most recent round of bidding. Participants whose upfront payment amount falls below that level, to four percent, should have five business days in which to increase their upfront payment to six percent in order to establish a margin for further increases. If participants fail to maintain this five percent minimum upfront payment, all bids submitted by the participant in the round

in which its upfront payment fell to four percent of its total bids should be deemed withdrawn, and subject to applicable penalties.

E. Upfront Payments, Less An Administrative Fee, Should be Returned to Participants who Withdraw from the Auction

11. The Commission proposes to continue to refund, prior to the end of the auction, upfront payments of participants who completely withdraw from the auction. The Companies generally agree that these upfront payments should be refunded promptly in order to free up these assets for the withdrawn participants. The Companies suggest that the amount of a withdrawing participant's refund be reduced, however, to recover the administrative costs associated with its participation in the auction. Just as the Commission determines the costs associated with regulating particular industries in connection with the assessment and recovery of annual regulatory fees, so should the Commission determine the administrative costs associated with partial auction participation. Since the administrative costs of retaining parties in the auction increases over time, the deductions from upfront payment refunds should increase over time to reflect these additional costs. For example, a participant who withdraws in the earlier stages of the auction would be entitled to a larger portion of upfront payment refund. This will enable the Commission to recover some of the administrative costs associated with running an auction, and will deter parties without a genuine interest in participating in an auction from filing a sham application.

F. Late Payments for Second Down Payments, Final Payments and Installment Payments, if Non-Recurring, Should Not Result in Automatic Default

12. The Companies agree that the Commission should provide limited relief for auction winners, by way of a limited grace period and associated late penalties. The Companies support the Commission's proposal that participants be given a ten business day grace period with respect to second down payments and final

payments.^{12/} Winners would be responsible for the payment of late fees associated with this grace period. As the Commission noted, where auction winners have made timely submissions of upfront and initial down payments, there is evidence that the licensees have the ability and intent to make the requisite second down payment and final payment associated with the licenses. The Companies agree with the Commission that the appropriate late fee amount is five percent of the amount due, consistent with current commercial practices.^{13/}

13. The Companies also support limited relief from payment deadlines with respect to installment payments. With respect to payments made within 90 days of the payment deadline (i.e., a non-grace period payment) the Companies agree that a late fee of five percent of the amount owed for that period should apply (and the resultant payment should be applied first to the late fee, then to interest, and finally to principal.)^{14/} With respect to late installment payments submitted pursuant to grace period relief (i.e., 90 days late), the Companies agree that an additional 10 percent penalty should be attached. The Companies also support the Commission's proposal that any licensee who fails to submit its payment, along with associated late fees, within 180 days of the deadline will have its license cancelled automatically.

14. In this regard, the Companies believe that, after a certain number of installment payments have been submitted late, the Commission should declare the licensee in default on its obligation. Licensees in default, either by virtue of several late payments or the failure to submit either a payment or request for relief, should be

^{12/} Notice, para. 61.

^{13/} Notice, para. 62.

^{14/} Notice, para. 70.

subject to the default penalties described in the *Notice*.^{15/} This policy is consistent with commercial lending practices and will discourage licensees from using the grace periods to gain additional time in which to secure capital to satisfy their indebtedness.

G. All Auction Winners Should Submit Second Down Payments or Final Payments Concurrently

15. All auction winners should be required to submit second down payments or final payments concurrently, regardless of the existence of petitions or objections to the auction winner's application. Otherwise, some auction winners are required to submit funds immediately to the FCC, while their competitors are granted additional time in which to secure funds to support their licenses. Also, since the Commission proposes to place in escrow all funds received with respect to applications under protest, and to refund funds received for applications not granted, these auction winners should not incur significant difficulties in securing additional capital with which to satisfy these payment obligations.

H. The Commission Should Implement Cross-Defaults

16. The Companies support the Commission's tentative conclusion that a licensee's default with respect to installment payments on one license should extend to other licenses held by that licensee.^{16/} The Commission concluded, and the Companies agree, that such a default policy encourages thoughtful participation in auctions, and encourages auction winners to find private market solutions to potential default on licenses. This provision also would be consistent with commercial lending policies. For the same reasons, the Companies support cross-defaults, meaning that a licensee who defaults with respect to PCS licenses would also be deemed to have defaulted on any SMR licenses it holds. Auction participants must always be mindful

^{15/} *Notice*, para. 75.

^{16/} *Notice*, para. 77.

of existing obligations, regardless of whether those obligations pertain to a different type of telecommunications service, which may effect their ability to satisfy other obligations incurred.

I. The Commission Should Decline to Impose Minimum Opening Bids

17. The Companies oppose the Commission's proposal to revise the generic auction rules to provide that the Commission may establish minimum opening bids for licenses.^{17/} The goals behind the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), which granted the Commission authority to auction spectrum, were to achieve rapid introduction of service to the public and to ensure that licenses go to parties most interested in developing the spectrum. The Budget Act explicitly prohibits the Commission from auctioning spectrum based upon an expectation of revenues. The Commission's proposal, to permit it to set minimum opening bids, appears to be contrary to the stated purposes of the Budget Act. Moreover, the function of setting minimum bids places the Commission in the role of market-evaluator -- a role not envisioned by the Budget Act. The marketplace, i.e., auction participants, investors and the financial community, should determine the value of spectrum being offered at auction. If the spectrum offered is not of significant value to any auction participant, participants should not be required to pay artificially inflated prices for that spectrum just to ensure the Commission a certain amount of revenues. Finally, with respect to the Commission's statement that minimum opening bids will move the auction along, the Companies respectfully submit that a more effective and appropriate way to permit the auctions to proceed quickly is to refrain from establishing a maximum bid increment (as discussed in the next section).

^{17/} Notice, para. 86.

J. The Commission Should Refrain From Establishing Maximum Bid Increments

18. The Commission has reserved to itself the right to establish minimum bid increments, acknowledging that minimum increments can move an auction along to closure more quickly. The Commission then tentatively concludes, however, that based upon some auction theories, the use of "jump bids" may render the auction less efficient and therefore warrants the establishment of maximum bid increments.^{18/} The Companies disagree. To the extent that "jump bidding" is experienced in an auction, its existence should not harm auction participants and is not inconsistent with the goals of the Budget Act -- putting licenses in the hands of those who value them most. So long as a "jump bidder's" bid matches what it is willing pay for the license should it win the auction, the jump bid should be permitted. Any risk of default on a jump bid will be reduced by the default and withdrawal penalties contained in the Commission's Rules. In addition, a requirement that auction participants maintain upfront payments equal to five percent of their total bids for the most recent round will serve as an additional deterrent to insincere jump bids.

K. Bid Withdrawals Should be Permitted at Any Time, Subject to Certain Conditions

19. The Commission seeks comment in paragraph 93 of the *Notice* regarding the use of bid withdrawals, and what safeguards can be implemented to prevent misuse of withdrawals. The Companies agree with the Commission that the ability to withdraw bids freely permits auction participants to pursue back-up strategies and to aggregate licenses, both of which are in the public interest. The Companies also agree with the Commission that, absent limitations, the ability to

^{18/} *Notice*, para. 88.

withdraw bids could be used to game the auction process. The Companies believe that a balance must be struck.

20. The Companies suggest that bid withdrawals should be permitted at any time during the auction, subject to certain conditions. All bid withdrawals should continue to be subject to applicable bid withdrawal penalties. The participant withdrawing the bid should not be permitted to re-gain eligibility on activity units lost as a result of the withdrawal. In addition, the auction participant submitting the winning bid in the round completed prior to the withdrawing bidder's winning bid should be permitted to bid again on the license, and to reacquire eligibility for bidding units necessary to resubmit the new bid. This last element should discourage auction participants from "jump bidding" where the sole purpose of the jump bid is to remove the license from the reach of the last round winner.

L. The Commission Should Adopt Certain Safe-Harbors to the Anti-Collusion Rules

21. The Commission requests comments on AirTouch's proposal, submitted in the paging market area licensing proceeding, that safe-harbors to the anti-collusion rules should be adopted in order to permit carriers to continue discussions relating to acquisitions/mergers and inter-carrier agreements.^{19/} As the Commission indicates, such safe harbors would require that persons involved in those discussions certify that they are not sharing information with other auction participants in violation of the anti-collusion rules. The Companies support this proposal. The messaging industry is undergoing significant consolidation at this time. By precluding carriers from continuing discussions relating to acquisitions and mergers, the Commission will place an artificial limitation on the natural operation of the marketplace. By preventing consolidation, the Commission may deny carriers the

^{19/} Notice, para. 102.

ability to achieve economies of scale and cost which would permit them to remain competitive in the industry. Absent evidence that certifications from auction participants regarding their compliance with the anti-collusion rules would not be sufficient to ensure such compliance, the Commission should not adopt rules which preclude sensible business decisions across the board.^{20/}

M. Construction Should be Permitted Prior to License Grant

22. The Companies agree with the Commission's proposal to extend the rules permitting construction prior to the grant of auction winners' long-form applications to all auctions.^{21/} Pre-grant construction will enable auction winners to introduce service to the public rapidly, and will permit existing operators who win at auctions to make necessary system expansions promptly. The Companies agree that pre-grant construction should be permitted notwithstanding the existence of petitions to deny the application. Since any pre-grant construction will be conducted at a carrier's own risk, that carrier should be permitted to weigh the risk of proceeding with construction or awaiting the outcome of the petition. As the Commission suggested, pre-grant construction should be permitted once the auction winner's long-form application has been accepted for filing by *Public Notice*, so long as the auction winner has submitted its down payment.^{22/} This condition will reduce the risk of default on a license after partial construction of a system has been accomplished.

^{20/} Pursuant to AirTouch's suggestion, the Commission, or interested parties, would have the opportunity to demonstrate that certifications submitted are false. Additional, proactive, measures are not necessary.

^{21/} *Notice*, para. 104.

^{22/} Currently, the Commission's Rules provide for the submission of down payments prior to the submission of long-form applications.

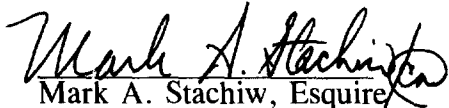
III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Companies respectfully request that the Commission adopt general auction rules consistent with these comments.

Respectfully submitted,

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